

Message Text

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ACTION EUR-25

INFO OCT-01 ISO-00 CIAE-00 DODE-00 PM-07 H-03 INR-10 L-03

NSAE-00 NSC-07 PA-04 RSC-01 PRS-01 SP-03 SS-20

USIA-15 SAJ-01 SAM-01 ACDA-19 IO-14 DRC-01 /136 W

----- 105248

P R 210925Z JUN 74

FM USMISSION BERLIN

TO AMEMBASSY BONN PRIORITY

INFO SECSTATE WASHDC PRIORITY 3552

AMEMBASSY LONDON

AMEMBASSY MOSCOW

AMEMBASSY PARIS

USMISSION NATO BRUSSELS

C O N F I D E N T I A L BERLIN 1044

E.O. 11652: GDS

TAGS: PGOV, WB, GE, GW

SUBJECT: BRUECKMANN

REF: BONN 9730, BONN 9801

1. FRG DESIRE TO CONSULT WITH BONN GROUP ON LEGISLATIVE ASPECTS OF BRUECKMANN CASE IS CERTAINLY WELCOME, BUT WE WONDER WHETHER FRG (AND UK EMBASSY) MAY NOT BE OVERDRAMATIZING MATTER. FROM PARA 4 REFTEL IT WOULD ALMOST APPEAR THAT FRG IS DESIROUS OF ALLIES TELLING IT THAT CDU/CSU DRAFT BILL TO AMEND INNER-GERMAN LAW OF LEGAL ASSISTANCE IN CRIMINAL MATTERS IS CONTRARY TO QA THUS ALLOWING GOVERNING PARTIES TO REBUT OPPOSITION'S OFFENSIVE. WE WOULD THINK IT PREFERABLE TO TAKE FRG ADVICE AND LOOK DISPASSIONATELY AT FIRST LEGAL AND THEN POLITICAL ASPECTS OF THAT PROPOSED LAW.

2. LEGALLY THERE WOULD SEEM LITTLE DOUBT THAT CDU/CSU AMENDMENT IS UNOBJECTIONABLE. 1953 LAW UNDER WHICH BRUECKMANN CASE HAS BEEN TRIED PRESENTLY PROVIDES SPECIFICALLY THAT THERE IS NO APPEAL FROM DECISION OF HIGHEST LAND COURT.

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CDU/CSU DRAFT WOULD AMEND THAT PROVISION BY PROVIDING THAT

THE HIGHEST LAND COURT'S DECISION MAY BE APPEALED TO THE BUNDESGERICHTSHOF. THIS WOULD MERELY BRING OPERATION OF 1953 LAW INTO CONFORMITY WITH MAJORITY OF CASES TRIED IN BERLIN, WHICH ARE, OF COURSE, APPEALABLE TO VARIOUS FEDERAL COURTS. IN 1969 BUNDESGERICHTSHOF REVIEWED DECISIONS OF BERLIN COURTS IN 136 CIVIL AND 121 CRIMINAL CASES. IN 1970 THE NUMBERS WERE 155 AND 160 RESPECTIVELY. WHILE WE DO NOT HAVE STATISTICS FOR PAST SEVERAL YEARS, THERE IS NO REASON TO BELIEVE THERE HAS BEEN SIGNIFICANT CHANGE.

3. THERE IS NOTHING IN QA TO CHANGE THIS SITUATION. TO CONTRARY, IT WILL BE RECALLED THAT ALLIED LETTER ON FEDERAL COURTS OF MAY 17, 1972 TO FOREIGN MINISTER SCHEEL CONFIRMED THAT "NO ALTERATION IN THE ACTIVITIES OF THE FEDERAL COURTS IN BERLIN IS FORESEEN UNDER THE PROVISIONS OF THE QUADRIPARTITE AGREEMENT OR IN THE LETTER OF THE THREE AMBASSADORS TO THE FEDERAL CHANCELLOR OF SEPTEMBER 3, 1971." LIKEWISE, WHILE RECOGNIZING THAT THERE WERE SOME SENSITIVITIES IN MATTER, TRIPARTITE COMMENTARY ON QA PREPARED BY POLITICAL COUNSELORS OF THREE EMBASSIES NOTED AT PARAGRAPH 115 THAT "THE COURTS COULD ONLY BE HELD TO EXERCISE DIRECT STATE AUTHORITY IF THEY GAVE JUDGMENTS ON THE BASIS OF LEGISLATION WHICH HAD NOT BEEN TAKEN OVER IN THE WESTEJK SECTORS." (WHILE WE WOULD NOT WISH TO ATTEMPT AN INTERPRETATION OF FRG CONSTITUTION, IT WOULD ALSO SEEM TO US NOT IMPROPER FOR A LAW TO PROVIDE THAT A CASE WHICH HAS NOT BEEN DISPOSED OF BY FINAL EXECUTION OF HIGHEST LAND COURT'S JUDGMENT COULD BE APPEALED TO THE BUNDESGERICHTSHOF AFTER THE ENTRANCE INTO FORCE OF AMENDMENT, PARTICULARLY TO EXTENT THAT EX POST FACTO ASPECT OPERATED TO BENEFIT OF AN ACCUSED RATHER THAN OF GOVERNMENT AUTHORITIES.)

4. BASIC POLITICAL, AS OPPOSED TO LEGAL FACTOR, APPEARS TO US TO BE THAT, UNLESS THE POLITICAL LANDSCAPE CONCERNING THE TWO GERMAN STATES CHANGES DRAMATICALLY IN THE NEXT YEAR OR SO, IT WILL SIMPLY BE TOO DAMAGING POLITICALLY FOR WEST GERMAN OR WEST BERLIN POLITICIANS TO ACQUIESCE IN RETURN OF BRUECKMANN TO GDR. THEY ARE THUS FACED WITH NEED TO USE TIME THEY HAVE BEFORE FINAL RESOLUTION OF HER APPEAL TO STRASBOURG TO FIND BEST LEGAL AND POLITICAL MEANS TO GET OUT FROM UNDER PROBLEM. CDU/CSU PROPOSAL IS ONE MEANS. SENAT IDEAS

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(BERLIN 1019) ARE ANOTHER. SIMPLE REPEAL OF 1953 WOULD BE YET A THIRD. UNLESS ALLIES ARE PREPARED TO OFFER THE GERMAN POLITICIANS A WAY OUT BY TAKING ON OWN SHOULDERS BURDEN OF, IN EFFECT, EITHER ORDERING RETURN OF AN 18-YEAR OLD TO THE GDR, OR OF DEVISING STRATEGY BY WHICH TO KEEP HER IN WEST, IT WOULD SEEM THAT OUR INTERESTS LIE IN NOT INTRUDING TOO DIRECTLY INTO GERMAN DECISION MAKING PROCESS. ONE EXCEPTION WE WOULD MAKE, OF COURSE, IS THAT MEANS DE-

VELOPED BY GERMANS MUST NOT DAMAGE SPECIFIC COMMITMENT
WE HAVE TO AVOID A CHANGE IN RELATIONSHIP OF FEDERAL
CONSTITUTIONAL COURT TO BERLIN.

5. WE RECOGNIZE THAT THERE IS ALWAYS POSSIBILITY THAT,
IF GERMANS DEVISE MEASURES FOR RESOLVING BRUECKMANN CASE
THAT INVOLVES DECISION BY BUNDESGERICHTSHOF, SOVIET AND GDR PRO-
TEST THAT GERMANY HAS REMAINED IN WEST WILL INCLUDE OBJECTION TO WAY
IN WHICH FEDERAL COURTS OTHER THAN KARLSRUHE
OPERATE WITH RESPECT TO BERLIN MATTERS. WE CANNOT,
HOWEVER, HIDE FACT THAT EXCEPT FOR CONSTITUTIONAL COURT
OTHER FEDERAL COURTS DO GIVE BERLIN DECISIONS. SOVIETS
HAVE ALWAYS HAD POSSIBILITY OF MAKING OBJECTIONS AND WE
HAVE BEEN PREPARED TO REBUT ALLEGATIONS OF IMPROPRIETY.
(SEE BERLIN A-62 AND A-50). OUR RECOMMENDATION, THEREFORE,
WOULD BE THAT WE ADVISE BRITISH AND FRENCH THAT WE
SEE NO LEGAL DIFFICULTY WITH CDU/CSU DRAFT AND THAT,
POLITICALLY, WE DO NOT WISH TO GET IN MIDDLE OF
INTERNAL PARTISAN SQUABBLE WHICH GERMANS ARE HAVING AS
TO HOW BEST TO ARRANGE FOR BRUECKMANN TO STAY IN WEST
UNTIL AND UNLESS IT APPEARS THAT CONSTITUTIONAL COURT
ISSUE IS AGAIN BEING RAISED OR GERMANS ARE OTHERWISE ACTING
OR CONSIDERING ACTION VIOLATIVE OF QA.

6. BONN 9730 RECEIVED AFTER ABOVE DRAFT. BRITISH INSISTENCE
ON DIGNIFYING BRUECKMANN LAWYER'S PUBLICITY GIMMICK OF REQUESTING
ALLIED COURT TO TRY CLIENT AND THREATENING TO HAUL BRITISH AND
FRENCH GOVERNMENTS BEFORE STRASBOURG HUMAN RIGHTS COMMISSION STRIKES
US AS A BIT SILLY CONSIDERING THAT IT CAN HARDLY CONVINCE HIM.
AND WE PRESUMABLY DO NOT WISH TO PLAY GAME OF NEWSPAPER
LEAKS WITH HIM. IT IS NEVERTHELESS NOT PARTICULARLY HARMFUL,
AND WE WOULD FAVOR AGREEING TO BRITISH TEXT AS IS IN ORDER
TO GET IT OUT AS QUICKLY AS POSSIBLE. KLEIN
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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: EXTRADITION, LAW, TRIALS, BERLIN TRIPARTITE MATTERS, COURTS
Control Number: n/a
Copy: SINGLE
Draft Date: 21 JUN 1974
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: golinofr
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1974BERLIN01044
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: GS
Errors: N/A
Film Number: D740162-1123
From: BERLIN
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1974/newtext/t19740626/aaaaavue.tel
Line Count: 154
Locator: TEXT ON-LINE, ON MICROFILM
Office: ACTION EUR
Original Classification: CONFIDENTIAL
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 3
Previous Channel Indicators:
Previous Classification: CONFIDENTIAL
Previous Handling Restrictions: n/a
Reference: BONN 9730, BONN 9801
Review Action: RELEASED, APPROVED
Review Authority: golinofr
Review Comment: n/a
Review Content Flags:
Review Date: 04 APR 2002
Review Event:
Review Exemptions: n/a
Review History: RELEASED <04 APR 2002 by izenbei0>; APPROVED <18 JUN 2002 by golinofr>
Review Markings:

Declassified/Released
US Department of State
EO Systematic Review
30 JUN 2005

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: BRUECKMANN
TAGS: PGOV, WB, GC, GE, (BRUECKMANN, INGRID)
To: BONN
Type: TE
Markings: Declassified/Released US Department of State EO Systematic Review 30 JUN 2005